

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

NAUTILUS INSURANCE COMPANY, an  
Arizona corporation,

Plaintiff,

v.

ALAN RAINWATER, individually, and as  
Personal Representative for the Estate of  
SUSAN M. RAINWATER; DANNY SIMON,  
an individual; MARLENE PERDUE,  
individually, and as Personal Representative of  
the Estate of JEREMY SIMON; MOUNTAIN  
CREST HOMES LLC, a Washington LLC;  
GARAGE PLUS STORAGE AVIATION LLC,  
a Washington LLC; LEAH MARIE MILLER,  
an individual,

Defendants.

Case No. 3:21-cv-05558

COMPLAINT FOR DECLARATORY  
RELIEF

**I. INTRODUCTION**

In this action, Plaintiff Nautilus Insurance Company (“Nautilus”) seeks declaratory relief concerning its obligations, if any, to provide insurance coverage in connection with the underlying claims in *Rainwater v. Simon, et al.*, Case No. 18-2-12960-1, in Pierce County Superior Court (“Underlying Action”).

**II. PARTIES**

1. Plaintiff NAUTILUS INSURANCE COMPANY (“NAUTILUS”), is a corporation that is incorporated in Arizona, with its principal place of business in Phoenix, Arizona.

2. Defendant ALAN RAINWATER is an individual and a citizen of Washington.

3. Defendant DANNY SIMON is an individual and a citizen of Washington.

4. Defendant MARLENE PERDUE, individually, and as Personal Representative of the Estate of Jeremy Simon, is a citizen of Washington.

5. Defendant MOUNTAIN CREST HOMES LLC is an LLC organized under the laws of Washington with its place of business in Eatonville, Washington. Upon information and belief, Danny Simon is the managing member of MOUNTAIN CREST HOMES LLC. He is an individual and a citizen of Washington.

6. Defendant GARAGE PLUS STORAGE AVIATION LLC is an LLC organized under the laws of Washington with its place of business in Spanaway, Washington. Upon information and belief, Clair Jenkins is a member of GARAGE PLUS STORAGE AVIATION LLC. She is an individual and a citizen of Washington. Upon information and belief, Danny Simon is also member of GARAGE PLUS STORAGE AVIATION LLC. He is an individual and a citizen of Washington.

7. Defendant LEAH MARIE MILLER is an individual and a citizen of Washington.

**III. JURISDICTION AND VENUE**

8. This Court has jurisdiction of this matter under 28 U.S.C. § 1332 (diversity) and 28 U.S.C. § 2201 (declaratory judgments). This is a civil action between citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

9. Venue is proper under 28 U.S.C. §1391, because a substantial part of the events or omissions giving rise to the claim occurred in this District.

10. Intradistrict assignment in this division is proper pursuant to LCR 3(e) because a substantial part of the events or omissions that gave rise to the claim occurred in Pierce County, Washington.

#### IV. RELEVANT FACTS

11. This Declaratory Relief Action arises out of a car-versus-bicyclist accident that occurred on August 9, 2018. Susan Rainwater was riding her bicycle northbound on State Route 7 at mile post 38.10 near 320<sup>th</sup> Street in Eatonville, Washington when she was struck by a 1986 Chevrolet K-10 pick-up truck with license plate number C93973A being driven by Jeremy Simon. She died from her injuries at the scene.

12. ALAN RAINWATER, the husband and personal representative of SUSAN RAINWATER, brought an action styled *Rainwater v. Simon, et al.*, Pierce County Cause No. 18-2-12960-1 against Jeremy Simon<sup>1</sup>, DANNY SIMON, MARLENE PERDUE, and MOUNTAIN CREST HOMES LLC (“Underlying Action”). LEAH MARIE MILLER filed a complaint-in-intervention. The operative Fourth Amended Complaint in the Underlying Action filed on or about April 6, 2021 adds GARAGE PLUS STORAGE AVIATION LLC (“GARAGE PLUS”) as a defendant.

13. In the Underlying Action, plaintiff alleges that the subject vehicle was owned, maintained, and provided by defendant DANNY SIMON, Jeremy Simon’s father. According to the operative complaint, Jeremy Simon was in the course and scope of employment for MOUNTAIN CREST and GARAGE PLUS at the time of the subject accident, driving to pick up one Mike Wager whom MOUNTAIN CREST and GARAGE PLUS allegedly hired for its land development project. According to the Fourth Amended Complaint, Jeremy Simon fell asleep while driving to pick up Mr. Wager, and struck and killed Susan Rainwater. After striking and killing Susan Rainwater, the operative complaint alleges, Jeremy Simon continued driving,

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<sup>1</sup> Jeremy Simon is now deceased.

picked up Wager, and took him to his job site to perform work for MOUNTAIN CREST and GARAGE PLUS. The operative complaint alleges that as a result, the decedent's estate, beneficiaries, and plaintiff have suffered serious emotional injury and incurred substantial costs and damages. Against MOUNTAIN CREST and GARAGE PLUS, the complaint sets forth the following Counts: Count I for Negligence, Count III for Negligent Entrustment, Count IV for Negligent Infliction of Emotional Distress, and Count VI for Agency.

**V. NAUTILUS POLICIES**

**A. Primary Policy**

14. NAUTILUS issued Commercial General Liability ("CGL") policy number PN018346 effective March 8, 2018 to March 8, 2019 to MOUNTAIN CREST HOMES, LLC ("NAUTILUS Primary Policy"). The limits of liability include \$1,000,000 each "occurrence" for "bodily injury" under Coverage A. The insuring agreement is contained in form CG 00 01 04 13, subject to various endorsements.

15. Form CG 00 01 04 13 provides in part as follows:

**SECTION I – COVERAGES**

**COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE**

**LIABILITY**

**1. Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion,

investigate any “occurrence” and settle any claim or “suit” that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

16. The NAUTILUS Primary Policy contains a **LIMITATION OF COVERAGE** endorsement (form S092 (08/17)), which replaces Paragraph **1.b.** under **SECTION I – COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY** as follows:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

**Premises:**

LOCATIONS PER FORM S150 (07/09)

**Project or Operation:**

**A.** If this endorsement is attached to Commercial General Liability Coverage Form **CG 00 01**, the provisions under this Paragraph **A.** apply:

**1.** Paragraph **1.b.** under **Section I – Coverage A – Bodily Injury and Property Damage Liability** is replaced by the following:

b. This insurance applies to “bodily injury” and “property damage” caused by an “occurrence” that takes place in the “coverage territory” only if:

(1) The “bodily injury” or “property damage”:

(a) Occurs on the premises shown in the Schedule; or

(b) Arises out of the project or operation shown in the Schedule;

(2) The “bodily injury” or “property damage” occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who is an Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

\* \* \*

17. The **COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**DECLARATIONS** (form S150 (07/09)) reads, in part, as follows:

**BUSINESS DESCRIPTION AND LOCATION OF PREMISES**

BUSINESS DESCRIPTION: GENERAL CONTRACTOR/DEVELOPER

LOCATION OF ALL PREMISES YOU OWN, RENT, OR OCCUPY ☐ Location address is same as mailing address.

1. 35813 MERIDIAN E EATONVILLE, WA 98328
2. AVIATOR HEIGHTS-PORION OF SECT 13&14, TWNSHIP 16N, RANGE 4 E, W.M. LOTS 1-21, EATONVILLE, WA 98328

18. The NAUTILUS Primary Policy further provides, in part, as follows:

**SECTION II – WHO IS AN INSURED**

1. If you are designated in the Declarations as:

\*\*\*

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

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2. Each of the following is also an insured:

a. Your “volunteer workers” only while performing duties related to the conduct of your business, or your “employees”, other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. . .

\*\*\*

19. Among the policy exclusions is the EXCLUSION-UNMANNED AIRCRAFT (CG 21 09 06 15), which reads in part as follows:

**EXCLUSION-UNMANNED AIRCRAFT**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**A. Exclusion 2.g. Aircraft, Auto Or Watercraft under Section 1 – Coverage A – Bodily Injury and Property Damage Liability is replaced by the following:**

**2. Exclusions**

This insurance does not apply to:

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**g. Aircraft, Auto Or Watercraft**

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**(2) Aircraft (Other Than Unmanned Aircraft), Auto Or Watercraft**

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft (other than “unmanned aircraft”), “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and loading or unloading”.

This Paragraph **g.(2)** applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage” involved the ownership, maintenance, use or entrustment to others of any



1 aircraft (other than unmanned aircraft”), “auto” or watercraft  
2 that is owned or operated by or rented or loaned to any  
3 insured.

4  
5 This Paragraph **g.(2)** does not apply to:

6 **(a)** A watercraft while ashore on premises you own or  
7 rent;

8 **(b)** A watercraft you do not own that is:

9 **(i)** Less than 26 feet long; and

10 **(ii)** Not being used to carry persons or property  
11 for a charge;

12 **(c)** Parking an “auto” on, or on the ways next to,  
13 premises you own or rent, provided the “auto” is not  
14 owned by or rented or loaned to you or the insured;

15 **(d)** Liability assumed under any “insured contract” for  
16 the ownership, maintenance or use of aircraft or  
17 watercraft; or

18 **(e)** “Bodily injury” or “property damage” arising out of:

19 **(i)** The operation of machinery or equipment  
20 that is attached to, or part of, a land vehicle  
21 that would qualify under the definition of  
22 “mobile equipment” if it were not subject to  
23 a compulsory or financial responsibility law  
24 or other motor vehicle insurance law where it  
25 is licensed or principally garaged; or

26 **(ii)** The operation of any of

the machinery or equipment listed in  
Paragraph **f.(2)** or **f.(3)** of the definition of  
“mobile equipment”.

20. The NAUTILUS Primary Policy states in part as follows:

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**A.** The following exclusion is **added** to **2. Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability, Coverage B – Personal And Advertising Injury Liability and Coverage C – Medical Payments:**

This insurance does not apply to “bodily injury”, “property damage”, “personal and advertising injury” or medical payments arising out of, or in any way related to, operations performed by any insured or any person or organization for whom any insured may be legally or contractually responsible, unless such operations are “designated operations”.

**B.** For the purpose of this endorsement, the following definition is **added** to the **Definitions** section:

“Designated operations” means only those operations performed by any insured that are described on the General Liability Coverage Part Declarations, the endorsements, or supplements of this insurance.

All other terms and conditions of this policy remain unchanged.

**20. SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS**

states the following:

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2. **Duties In The Event Of Occurrence, Offense, Claim Or Suit**

a) You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b) If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c) You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

1                   (4) Assist us, upon our request, in the enforcement of  
2 any right against any person or organization which may be liable to  
3 the insured because of injury or damage to which this insurance may  
4 also apply.

5           d) No insured will, except at that insured's own cost, voluntarily  
6 make a payment, assume any obligation, or incur any  
7 expense, other than for first aid, without our consent.

8       21. Policy definitions include, but are not limited to, the following:

9           **SECTION V – DEFINITIONS**

10  
11           \*\*\*

12       3. “Bodily injury” means bodily injury, sickness or disease sustained  
13 by a person, including death resulting from any of these at any time  
14 . . .

15           \*\*\*

16       5. “Employee” includes a “leased worker”. “Employee” does not  
17 include a “temporary worker”.

18           \*\*\*

19       10. “Leased worker” means a person leased to you by a labor leasing  
20 firm under an agreement between you and the labor leasing firm, to  
21 perform duties related to the conduct of your business. “Leased  
22 worker” does not include a “temporary worker.”

23           \*\*\*

24       13. “Occurrence” means an accident, including continuous or repeated  
25 exposure to substantially the same general harmful conditions.

26           \*\*\*

1           **19.** “Temporary worker” means a person who is furnished to you to  
2           substitute for a permanent “employee” on leave or to meet seasonal or  
3           short-term workload conditions.

4           \*\*\*

5           **20.** “Volunteer worker” means a person who is not your “employee” and  
6           who donates his or her work and acts at the direction of and within the  
7           scope of duties determined by you, and is not paid a fee, salary or other  
8           compensation by you or anyone else for their work performed by you.

9           **B. NAUTILUS Excess Liability Policy**

10          22. NAUTILUS issued an Excess Liability Policy number AN049160 effective  
11          March 8, 2018 to March 8, 2019 to MOUNTAIN CREST HOMES, LLC (“NAUTILUS Excess  
12          Liability Policy”). The limits of liability include \$2,000,000 per loss event. The insuring  
13          agreement is contained in form NE 00 31 04 10, subject to various endorsements.

14          23. Form NE 00 31 04 10 provides in part as follows:

15                   **SECTION I – EXCESS LIABILITY COVERAGE**

16                   1.       **Insuring Agreement**

17                   a)       We will pay on behalf of the “insured” the “ultimate net loss”  
18                               in excess of the “underlying insurance limit” because of  
19                               injury or damage caused by a “loss event” to which the  
20                               insurance applies provided:

21                   (1)       The aggregate amount of all limits of “Underlying  
22                               Insurance,” as shown in the Schedule of “Underlying  
23                               Insurance”, has been exhausted by payment of judgments,  
24                               settlements, costs or expenses; and

25                   (2)       The “loss event” occurs or is committed during the policy  
26                               period.

b) Except to the extent any terms, definitions, limits of insurance, conditions or exclusions of the “controlling underlying insurance” are different from any terms, definitions, limits of insurance, conditions or exclusions of this policy, this policy will provide the same coverage for “ultimate net loss” as provided by the “controlling underlying insurance”. If any terms, definitions, limits of insurance, conditions or exclusions of this policy are more restrictive than those of the “controlling underlying insurance”, then this policy’s terms, definitions, limits of insurance, conditions or exclusions will apply. However, under no circumstances will this policy provide broader coverage than that provided by the “underlying insurance”.

## 2. Defense

a) We will have no duty to investigate or defend any claim or “suit”. We will have the right and be given the opportunity to associate with any “insured” or “underlying insurer” in the investigation, settlement or defense of any claim or “suit” that may involve this insurance.

24. The NAUTILUS Excess Liability Policy also contains relevant definitions, exclusions, and endorsements (form NE0031 (4/10)) provided by SECTION IV-DEFINITIONS as follows:

### SECTION IV – DEFINITIONS

1. “Controlling underlying insurance” means the policy or policies that are indicated as such on the Schedule of “Underlying Insurance”.

\* \* \*

1           4.     “Insured” means any person or organization qualifying as such  
2                 under the “controlling underlying insurance”.

3                 \* \* \*

4           5.     “Loss Event” means the happening, situation or circumstances that  
5                 initiates the application of the “underlying insurance” as designated  
6                 in the Schedule of “Underlying Insurance”.

7                 \* \* \*

8           7.     “Suit” means a civil proceeding in which damages because of a “loss  
9                 event” to which this insurance applies are alleged. “Suit” includes:

10           a)     An arbitration proceeding in which such damages are claimed  
11                 and to which the “insured” must submit or does submit with  
12                 our consent; or

13           b)     Any other alternative dispute resolution proceedings in which  
14                 such damages are claimed and to which the “insured” submits  
15                 with our consent or the “underlying insurer’s” consent.

16           8.     “Ultimate net loss”

17           a)     Means the total sum, after reduction for recoveries of salvages  
18                 collectible, that the “insured” becomes legally obligated to  
19                 pay by reason of a judgment against the “insured” after actual  
20                 trial, or alternative dispute resolution by written agreement of  
21                 the “insured”, the claimant or the claimant’s legal  
22                 representative and us;

23           b)     Includes the costs of attorneys’ fees in defending any claim  
24                 or “suit” incurred by any “underlying insurer” if such costs  
25                 are included within the limits of insurance of the “underlying  
26                 insurance”. However, these costs do not include salaries and

expenses of employees or regular officials of the “underlying insurer” of the “insured”; and

c) Includes all interest on judgments paid by the “insured” or any “underlying insurer”.

9. “Underlying insurance” means the coverage(s) afforded under insurance policies, for the limits shown, as designated in the Schedule of “Underlying Insurance”, and any renewals or replacements of those policies. Policies endorsements or coverages written on a claims-made policy form will not be considered “underlying insurance”.

10. “Underlying insurance limit” means the sum of amounts applicable to any claim or “suit” from:

a) “Underlying insurance”, whether such “underlying insurance” is collective or not;

b) Other insurance; whether primary, excess, contingent or on any other basis, except such insurance as is specifically purchased to apply in excess of this policy’s Limits of Insurance; and

c) Any applicable self-insured retention or deductible.

“Underlying insurance limit” does not include limits of policies, coverages and endorsements written on a claims-made policy form.

11. “Underlying insurer” means any insurer who provides any policy or coverages of “underlying insurance.”

25. The NAUTILUS Excess Liability Policy defines “insured” as any person or organization qualifying as such under the “controlling underlying insurance.” The “controlling underlying insurance” is the NAUTILUS Primary Policy, policy number PN 018346. As set



forth above, Form CG 00 01 (04/13) contains SECTION II-WHO IS AN INSURED, provided as follows:

12. If you are designated in the Declarations as:

\* \* \*

c) A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

13. Each of the following is also an insured:

a) Your “volunteer workers” only while performing duties related to the conduct of your business, or your “employees”, other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.

26. The policy definitions include SECTION V-DEFINITIONS as follows:

14. “Employee” includes a “leased worker”. “Employee” does not include a “temporary worker”.

27. The policy Form NE 00 31 (04/10) provides the following exclusion:

**3. Exclusions**

The following exclusions apply in addition to any applicable exclusion contained in the “controlling underlying insurance”.

This insurance does not apply to:

**a) Auto Coverage Exclusion**

Any loss, cost or expense payable under or resulting from any first party automobile physical damage coverage; any obligation under any automobile no-fault law; personal injury protection or auto medical payments coverage; or uninsured or underinsured motorist act, law or obligation.

28. The NAUTILUS Excess Liability Policy contains an endorsement provided in Form NE 00 72 (10/14), **EXCLUSION – ALL AUTOS**, which reads as follows:

**EXCLUSION – ALL AUTOS**

This endorsement modifies insurance provided under the following:

**EXCESS LIABILITY POLICY**

This insurance does not apply to any injury or damage, costs or expenses arising out of, resulting from, caused or contributed to by the ownership, maintenance, use, loading or unloading of entrustment to others of any auto.

All other terms and conditions remain unchanged.

29. The NAUTILUS Excess liability policy states as follows:

**SECTION III – CONDITIONS**

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**5. Duties In The Event Of Occurrence, Offense, Claim Or Suit**

a) You must see to it that we are notified, in writing, as soon as practicable, of any act, "loss event" or an offense, regardless of the amount, which may reasonably be expected to result in a claim under this policy. To the extent possible, notice should include:

(1) How, when and where the act, "loss event" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the act, "loss event" or offense.

**b)** If a claim is made or "suit" is brought against any "insured",  
you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

**c) You and any other involved "insured" must:**

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the "insured" because of injury or damage to which this insurance may also apply.

**d)** No "insured" will, except at that "insured's" own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

**VI. NAUTILUS'S REQUEST FOR DECLARATORY JUDGMENT (28 U.S.C. §2201)**

**COUNT I**

**(For Declaratory Relief Against All Defendants That There Is No Coverage Under NAUTILUS'S Primary CGL Policy)**

30. The foregoing paragraphs are re-alleged.

31. Under the Limitation of Coverage to Locations Per Form S150 (07/09) set forth above, only “bodily injury” that occurs on the premises shown on the Schedule of Locations Per Form S150 (07/09) or arises out of the project or operation shown in the Schedule falls within the Insuring Grant. The Schedule on Form S150 (07/09), states that the Business Description is “General Contractor/Developer.”

32. The Schedule further lists the following locations: 1.) 35813 Meridian E Eatonville, WA 98328; and 2.) Aviator Heights – Portion of Sect 13&14, Township 16N, Range 4 E, W.M. Lots 1-21, Eatonville, WA 98328.

33. To the extent the subject accident took place off the described premises and did not involve the designated operations NAUTILUS seeks a determination it owed no duty to indemnify based on its Limitation of Coverage to Locations per Form 5150 (07/09).

34. Coverage is also precluded under the Limitation of Coverage to Designated Operations (form L240 (06/07)) endorsement referenced above. The exclusion bars coverage for “bodily injury” “arising out of, or in any way related to, operations performed by any insured or any person or organization for whom any insured may be legally or contractually responsible, unless such operations are ‘designated operations’.” In turn, “designated operations” are defined as “only those operations performed by any insured that are described on the General Liability Coverage Part Declarations, the endorsements, or supplements of this insurance.”

35. Here, the Business Description of MOUNTAIN CREST indicated on the Declarations is “GENERAL CONTRACTOR/DEVELOPER.” To the extent that Jeremy Simon was not performing activities related to MOUNTAIN CREST’s general contractor/developer

1 operations at the time of the accident, coverage is barred.

2 36. It was also the intent of the parties that the NAUTILUS Policy would not provide  
 3 coverage for accidents involving the use of autos. Exclusion g. of the NAUTILUS Policy, the  
 4 auto exclusion, expressly excludes coverage for “bodily injury” or “property damage” arising out  
 5 of the ownership, maintenance, use or entrustment to others of any. . . “auto”. . . owned or  
 6 operated by or rented or loaned to any insured. Use includes operation and loading or  
 7 unloading”. Under g.(2), the auto exclusion applies even if the claims against any insured allege  
 8 negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring  
 9 of others by that insured, if the “occurrence” which caused the “bodily injury” or “property  
 10 damage” involved the ownership, maintenance, use or entrustment to others of any “auto” that is  
 11 owned or operated by or rented or loaned to any insured.

12 37. The definition of “insured” includes "volunteer workers" while performing duties  
 13 related to the conduct of the insured's business, or the insured's "employees" for acts within the  
 14 scope of their employment by the insured or while performing duties related to the conduct of the  
 15 insured's business. A reasonable purchaser of insurance would understand that the auto-related  
 16 acts alleged in the Underlying Complaint are not covered under the NAUTILUS Policy. Thus,  
 17 NAUTILUS seeks a determination that it owes no duty to indemnify with respect to the  
 18 Underlying Action based on its auto exclusion.

19 38. As set forth above, the auto exclusion contained in the NAUTILUS Primary  
 20 Policy applies, *inter alia*, to “bodily injury” arising out of the “ownership” of any auto “owned or  
 21 operated” by any “insured.” To the extent DANNY SIMON was a member of MOUNTAIN  
 22 CREST, he qualified as an “insured” under the NAUTILUS Primary Policy with respect to the  
 23 conduct of MOUNTAIN CREST’s business. Further, to the extent DANNY SIMON was a  
 24 manager of MOUNTAIN CREST, he was an “insured” with respect to his duties as such.  
 25 Therefore, to the extent DANNY SIMON was an “insured” under the NAUTILUS Primary  
 26 Policy who “owned” the subject vehicle involved in the accident, the subject vehicle was

1 “owned” by an “insured” such that the auto exclusion applies to preclude coverage.

2 39. To the extent Jeremy Simon was an “employee” of MOUNTAIN CREST acting  
3 in the scope of such employment, or while performing duties related to the conduct of  
4 MOUNTAIN CREST’s business at the time of the subject accident, he qualified as an “insured.”  
5 In such case, the subject vehicle was being “operated” by an “insured” such that the auto  
6 exclusion set forth above applies to bar coverage.

7 40. To the extent Jeremy Simon was an unpaid “volunteer worker,” as defined, while  
8 performing duties relating to the conduct of MOUNTAIN CREST’s business, he qualified as an  
9 “insured.” In such case, the subject vehicle was being “operated” by an “insured” such that the  
10 auto exclusion set forth applies to bar coverage.

11 41. To the extent the insured violated the cooperation clause in failing to cooperate in  
12 its own defense, which resulted in substantial prejudice of NAUTILUS, coverage is barred.

13 42. Defendants dispute the foregoing contentions of NAUTILUS, such that there is an  
14 actual controversy and a *bona fide* dispute. Pursuant to the Uniform Declaratory Judgment Act,  
15 28 U.S.C. §2201, *et seq.*, NAUTILUS requests the Court declare NAUTILUS owes no duty to  
16 indemnify regarding the Underlying Action.

## 17 COUNT II

### 18 (For Declaratory Relief Against All Defendants That There Is No Coverage Under 19 NAUTILUS’S Excess Liability Policy)

20 43. The foregoing paragraphs are re-alleged.

21 44. As set forth above, NAUTILUS’s Excess Liability Policy identifies the  
22 NAUTILUS Primary Policy, namely, NAUTILUS’s CGL insurance policy number PN018346,  
23 as the “underlying insurance.” The NAUTILUS Primary Policy has limits of \$1,000,000 each  
24 occurrence and a \$2,000,000 general aggregate limit. NAUTILUS’S Excess Liability policy is  
25 not triggered until the aggregate amount of the limits of the NAUTILUS CGL Policy (as  
26 underlying insurance”) have been exhausted by payment of judgments, settlements, costs or

1 expenses.

2 45. Here, the NAUTILUS Primary Policy limit has not been exhausted, meaning the  
3 NAUTILUS Excess Policy is not yet triggered. Thus, there is no coverage under the  
4 NAUTILUS Excess Liability policy.

5 46. The NAUTILUS Excess Liability Policy's definition of an "INSURED" under  
6 NE0050 (10/14) Section IV, provides that "Insured" means any person or organization other than  
7 a joint venture, qualifying as such under the "controlling underlying insurance".

8 47. To the extent the defendants in the Underlying Action, including without  
9 limitation Jeremy Simon, DANNY SIMON, MOUNTAIN CREST and GARAGE PLUS do not  
10 qualify as "insureds" as defined, coverage is barred.

11 48. It was also the intent of the parties that the NAUTILUS Excess Liability Policy  
12 would not provide coverage for accidents involving the use of autos. Form NE 00 31 (04/10) of  
13 the NAUTILUS Excess Liability Policy expressly excludes coverage for "any first party  
14 automobile physical damage" or any obligation under "any automobile no-fault law" or "for  
15 personal injury protection" or "auto medical payments."

16 49. Form NE 00 72 (10/14) Exclusion - All Autos endorsement expressly excludes  
17 coverage for "any injury or damage, costs or expenses arising out of, resulting from, caused or  
18 contributed to by the ownership, maintenance, use, loading or unloading of entrustment to others  
19 of any auto." A reasonable purchaser of insurance would understand that the auto-related acts  
20 alleged in the Underlying Action are not covered under the NAUTILUS Excess Liability Policy.  
21 Thus, NAUTILUS seeks a determination that it owes no duty under the NAUTILUS Excess  
22 Liability Policy based on its auto exclusion.

23 50. To the extent the insured violated the cooperation clause in failing to cooperate in  
24 its own defense, which resulted in substantial prejudice of NAUTILUS, coverage is barred.

25 **VII. RESERVATION OF RIGHTS**

26 51. The foregoing paragraphs are re-alleged.

NAUTILUS reserves the right to amend this complaint to allege any additional policy provision or claim which may be relevant to this matter.

**VIII. PRAYER FOR RELIEF**

NAUTILUS requests judgment against the defendants as follows:

1. For Judgment for NAUTILUS and against defendants, and each of them;
2. For a declaration that NAUTILUS owes no duty to defend or indemnify with regard to the Underlying Action under its Primary Commercial General Liability Policy;
3. For a declaration that NAUTILUS owes no duty with regard to the Underlying Action under the NAUTILUS Excess Liability Policy;
4. NAUTILUS further prays for costs and fees as permitted by statute and court rule, and such other relief as the Court finds just and proper under the circumstances.

DATED: August 4, 2021

By: /s/ Peter J. Mintzer

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